Supreme Court, U.S.
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No. 091201

IN THE
Supreme Court of the United States

JACK L. JORDAN,

Petitioner,

v.

UNITED STATES DEPARTMENT OF LABOR,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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February 4, 2010

QUESTIONS PRESENTED FOR REVIEW

The issues in this Petition concern the due process constitutional protections for Petitioner's status as a child in a family household in which he was raised from age six to adulthood in a parent-child relationship; and rejection by Respondent of the application of a decision of the Washington State Supreme Court concerning such questions of domestic relationship at issue in this case.

PARTIES & CORPORATE DISCLOSURE STATEMENT

The parties to this petition are plaintiff Jack L. Jordan, an individual, hereinafter referred to as Jack, or the petitioner, and the defendant U.S. Department of Labor, a federal agency, hereinafter referred to as the respondent.

Pursuant to this Court's Rule 29.6, petitioner hereby certifies as follows:

1. Petitioner is an individual and not a corporation.

2. Respondent is a federal agency.

3. No parties to the case have parent corporations.

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JURISDICTION

This appeal is to the Memorandum decision of United States Court of Appeals for the Ninth Circuit filed November 6, 2009 affirming the District Court's grant of Summary Judgment for the respondent. This Court has jurisdiction under 28 U.S.C. § 1254(1).

PERTINENT STATUTE

42 U.S.C. § 7384, *et seq.*...

The survivorship sub-section at issue is § 7384 (s)(e)(3)(B).

STATUTORY CONTEXT

The Act's survivorship section 7384 (s)(e)(3)(B) provides that if there is no surviving spouse, "such payment shall be made in equal shares to all children of the covered employee who are living at the time of payment." The survivorship sub-section at issue is § 7384 (s)(e)(3)(B), defines child: "a child includes a recognized natural child, a stepchild who lived with an individual in a regular parent-child relationship, and an adopted child."

Since Jack was not one of the examples specified in the definition, neither "a recognized

natural child, a stepchild nor an adopted child," the issue became whether or not the word "includes" in the definition would encompass the status of Jack as being raised from childhood as part of the family of Ray Jordan in a parent-child relationship.

SUMMARY OF FACTS

The Energy Employees Occupational Illness Program Act (EEOICPA), 42 U.S.C. § 7384, *et seq.* (hereinafter, the Act), is a worker compensation act designed to provide: "efficient, uniform and adequate compensation for...radiation-related health conditions," § 7384 (a)(8) FINDINGS.

The Act was administered by the respondent, the U.S. Department of Labor. Part B of the Act provides for the award of a lump sum benefit of $150,000 for workers who had developed a cancer that was "more likely than not" caused by workplace radiation. Ray Jordan (hereinafter Ray), a former worker at the Hanford Nuclear Site in Eastern Washington, now deceased, had developed a cancer of the lung that was found to have had a probability of causation over 50% and thereby qualified for the lump sum benefit of $150,000.

Ray was survived by two boys, William C. Jordan, a stepchild, son of Ray's wife Eunice, and petitioner Jack L. Jordan, a nephew of Eunice. Jack was born in June 1942 as a child of LuLu Belle Walker and an unknown father. Because of the illness of Jack's mother, Jack had been given at infancy to her sister Eunice to live with Eunice and Ray Jordan for years 1943-1944 until his mother married a Clyde Wyman in 1945, when Jack's mother then reunited with Jack for 3 years until she died in January 1949 when Jack 6 years old. At that time Jack was again returned to live with his Aunt Eunice and Uncle Ray and lived with them from 1949 until he enlisted in the Marines in 1960, AR 508, App. 36a (Finding of Fact #6 in respondent's Final Denial).

Jack developed a close and lasting parent-child relationship with Ray, confirmed by affidavit of Ray's sister. This relationship continued through the years until Ray's death. AR 72, App. 48a-50a. Jack was named as executor of Ray's will and was named on the death certificate as Ray's son. Both boys were raised in Ray's household, and upon his death were

his only survivors, as aunt Eunice had died earlier. In a written statement of his family affairs, Ray had written that he "had two boys, William C. and Jack Lee," AR 199, App. 57a.

ARGUMENT

"The word 'includes' is usually a term of enlargement, and not of limitation..." *Argosy Ltd. v. Hennigan*, 404 F.2d 14, 20 (5th Cir. 1968). "...the expansive term 'Including' demonstrates that, at the very least, Congress meant for 'commercial' legal relationships to consist of contracts evidencing a commercial transaction, *as well as similar agreements*." See *Federal Land Bank v. Bismarck Lumber Co.*, 314 U.S. 95, 62 S. Ct.1, 4 (1941). (italics added) "The district court, in a carefully written and thoughtful opinion, construed 'including' to mean, essentially, **'such as.'** *Arizona State Bd. v. U.S. Dept. Of Educ.*, 464 F.3d 1003; (9th Cir. 2006). (bolding added).

Arizona would hold that "a recognized natural child, a stepchild who lived with an individual in a regular parent-child relationship, and an adopted child," are just illustrative examples of to whom the

payments shall be made in equal shares.

Payment to Jack of his equal share of the award was denied by the respondent on the basis that he was neither of the three examples listed in the statutory definition. This denial implicates Jack's constitutional rights under the parent-child relationship developed as a member of Ray's household from age six until adulthood. Petitioner asserts that his family membership in a parent-child relationship with Ray prevents the respondent from denial of his share of the statutory entitlement without due process under the Fifth Amendment of the U.S. Constitution. To exclude the petitioner from his share of the entitlement on the basis he would not be included as a child, despite recognition that he was in a parent-child relationship with the worker, is clearly contrary to the intent of survivorship section § 7384 (s)(e)(3)(B) that "such payment shall be made in equal shares **to all children** of the covered employee." (holding added)

There are over 500,000 children nationwide who are not living with either parent, classified by

the U.S. Department of Health and Human Services as foster care children, in which classification they include approximately 125,000[1] children who are those living with a relative, rather than a parent. These children are subject to the widely disparate conditions and requirements of the various states, but underlying all of them are the common constitutional rights of Due Process under the 14th and 5th Amendments.

The Washington Supreme Court has recognized the constitutional rights of a child in a familial setting to Due Process protection of his or her status as a "child" in the family.

> "*Santos* instructs that, 'The importance of familial bonds accords constitutional protection to the parties involved in judicial determinations of the parent-child relationship.' 104 Wn.2d at 146. The notion of these 'parties' invariably includes the children

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[1]http://www.childwelfare.gov/pubs/factsheets/foster.cfm.

> at issue. *Id.* 'Familial bonds' are not just about biology; 'biological relationships are not exclusive determination of the existence of a family.' *Smith v. Org. of Foster Families for Equality & Reform,* 431 U.S. 816, 843, 97 S.Ct. 2094, 53 L. Ed. 2d 14 (1977)....*In re Parentage of L.B.,* 155 Wn.2d 679, 122 P.3d 161 (recognizing *de facto* parent status for non-biological parents). Once we recognize that the child's interest in his or her familial bonds is constitutionally protected, *Santos,* 104 Wn.2d at 146, and that familial bonds stem not just from biology, but also from the intimacies of daily association, then it logically follows that a child has a constitutionally protected interest in whatever relationships comprise his or her family unit." *In the Matter of the Custody of Shields, Jenny Shields,* 157 Wn.2d 126 (2006)(*en banc*).

This Court has spoken in cases that relate to this issue, for example:

"Our decisions establish that the Constitution

> protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural... Especially in times of adversity, such as the death of a spouse or economic need, the broader family has tended to come together for mutual sustenance and to maintain or rebuild a secure home life. This is apparently what happened here." *Moore v. City of East Cleveland*, 431 U.S. 494 (1977).

Moore held that a grandchild's status as a child in a broader familial setting was protected by Due Process from agency interference requiring his exclusion from membership in the family. Clearly this case is analogous in the sense that petitioner's status as a child within the family of his uncle and aunt is protected by Due Process from exclusion by respondent's narrow and limited interpretation of the statutory definition of petitioner's survivorship rights to a statutory entitlement.

I. Facts Supporting Jack's Status in a Parent-Child Relationship

From the onset of his claim filed in October 2002, Jack began supplying the respondent with various records documenting his parent-child relationship as a member of Ray's family including the following items.

Ray's sister, Myreta P. Shirley, submitted an affidavit attesting that Jack was brought up in a father-son relationship with Ray that continued into adulthood, AR 161, App. 54a. Ray's will was furnished to the respondent, Ct. Rec. 22 and Ct. Rec. 40, Exh. C, App. 66a-69a, but the respondent omitted this key document from its administrative record. This close, continuing relationship is best demonstrated by Ray's will, which divided Ray's estate equally between William and Jack, but it was Jack who was made the sole executor of Ray's will. Perhaps most telling is a handwritten statement by Ray Jordan in which Ray states [he had] "two boys William C. and Jack Lee," AR 199, App. 57a. There were also school records submitted proving Ray was

acting as parent of Jack. The "Pupil Health Card" entries show Jack was halfway through 1st grade in 1949 when his mother died, and that the name Wyman was crossed out with a notation on Jack's health records that he stays with Ray Jordan, AR 169, App. 55a. On his "Pupil's Accumulative Record," his mother's name as Wyman is crossed out and she's shown as not living, and that Jack "lives with" "Aunt and Mr. Ray Jordan." The high school records show the names Ray Jordan and Eunice Jordan at the top of the grade columns. AR 170, App. 56a. Also supplied was the verification on Jack's enlistment form for U.S. Marines of Jack Lee Jordan being known by that name since death of his mother in 1946, See Exhibit B-3 and D to Ct. Rec. 40, App. 65a and 70a, which was submitted to the respondent but was another item omitted from their administrative record. Having initially naming the petitioner as one of the two boys in his family, in his later years Ray Jordan designated Jack as not only an equal co-beneficiary of his will, but also as the sole executor of his estate. This will, furnished to respondent but omitted from their administrative

record, (see Ct. Rec. 22 and Ct. Rec. 40, Exh. C, App. 66a-69a), was executed in August 1998, a full 50 years after petitioner became part of Ray's family at age six. It was Jack who handled the funeral arrangements, being designated as the informant and as the son on Ray's death certificate dated February 1, 2000, AR 72, App. 48a. If the wishes of the worker, for whom the statute was created, is to mean anything, the petitioner would qualify as an eligible surviving child.

II. Respondent Disregarded Evidence of Parent-Child Relationship

Despite respondent's knowledge of Ray's statement in his will that "I have no natural born or adopted children," the respondent in each letter to Jack continued to ask him, no less than five times, for adoption papers. (AR's 77, 78, 187, 236, 239, and 252, referenced, but not included in the appendix for brevity). It is remarkable that at no time during all of these communications from the respondent over a five-year period did they ever address the significance of Jack's claim of a parent-child relationship in Ray's family. Respondent then

asserts in its final argument before the Circuit Court that petitioner has waived its argument that the close child-parent relationship as a member and son of his uncle Ray's household qualifies him as included within the statutory definition of "child." The respondent falsely asserts that this was never made at the administrative level and therefore waived. To the contrary, Jack's voluminous documentation of a child-parent relationship with Ray Jordan was studiously ignored without comment or dispute by the respondent. Respondent's deliberate disregard of this evidence does not extinguish its existence or validity. The defect in respondent's argument is best demonstrated in the administrative process by its admission in its key memorandum dated September 29, 2003 from appellees Branch Chief of Policies and Regulations at its National Office, AR 235, App. 58a. This key memorandum states *"In support of a parent-child relationship Jack Jordan provided a cumulative copy of his report card from 1949 through 1956."* (italics added) Obviously respondent knew that Jack was trying to show a parent-child relationship as coming

within the statutory definition of child. Likewise the respondent's Director's Order of April 30, 2007, in recitation of the administrative proceedings, acknowledged that "Jack contends that his relationship with his uncle *"was one of parent and child."* The order further states that Jack, *"In support of his claim..."* provided the early history of his birth and his first period of living as an infant with his aunt Eunice and uncle Ray from 1943 until 1944, then rejoining his mother during her marriage to a Mr. Wyman until her death in January 1949 when Jack was six, and was returned again to live with his aunt and uncle Ray until joining the Marines at age 17. (italics added), AR 464, App. 62a. This is a further admission that respondent knew of Jack's effort to show this parent-child relationship as being within the ambit of the term "includes" in the statutory definition of child. In fact it was the only argument Jack asserted for the first five years of his claim until the Washington State "*de facto*" parent case of *In Re the Parentage of: L.B.; Sue Ellen Carvin v. Page Britain*, 155 Wn.2d 679 (2007). Jack had made his parent-child argument and provided

supporting documents from the beginning. Before the District Court, the respondent had only complained that what it falsely characterized as "Jordan's new proposed alternative definition" which "cannot now be considered by this Court because..." [falsely alleging] it was "not raised during adjudication of Jordan's administrative claim." Ct. Rec. 91, Pg.7. The District Court ignored this argument in its decision, and it was not until the appellate level before the Circuit Court did the respondent make an argument specifically of "waiver," which is contradicted in respondent's own administrative records.

The District Court stated that the standard of review of agency decisions is limited by the APA, 5 U.S.C. § 706 (2)(A), further stating that "The arbitrary and capricious standard is appropriate when resolving factual disputes implicating substantial agency expertise..." citing *Marsh v. Or. Natural Re. Council,* 490 U.S. 360 (1989). However, there is no agency expertise involved in the statutory definition of "child" regarding its eligibility for survivor benefits and deference to agency

interpretation under *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, (1984) does not apply. It is clear that by the use of the word "includes" that the definition is not limited to just the examples given. Where Congressional intent as to the meaning of a statutory definition can be determined under the traditional principles of statutory construction, the deference to agency interpretation under *Chevron* is not applicable. See *Arizona Cattle Growers Assoc. v. U.S. Fish & Wildlife*, 273 F.3d 1229 (9th Cir. 2001).

III. Obligation of Respondent to Address a Reasonable Alternative to the Statutory Examples

Until the 2007 Washington State Supreme Court *de facto* parent decision, *In Re the Parentage of: L.B.; Sue Ellen Carvin v. Page Britain*, 155 Wn.2d, 679 (2007), petitioner had been relying just upon his status since age six being raised as a son and member of the Ray Jordan family in a close familial relationship to qualify him as a "child" under the statutory definition. However, never at any place in the record did respondent or the District Court ever address this question. As the record will

show, in every communication with Jack, he was asked for proof of adoption, although they knew from possession of Ray's will (omitted from the administrative record) that Ray had never adopted Jack. They also knew from the birth certificates that Jack could not qualify as a stepchild.

A comprehensive statement of the legal principle requiring that an agency consider alternatives to its decision, is the opinion of the Court delivered by Ginsburg, Chief Judge, D.C. Court.

> "The Supreme Court has cautioned 'over and over again' that 'in expounding a statute, we must not be guided by a single sentence or member of a sentence, but [should] look to the provisions of the whole law . . .' *(Citations omitted)* ...In sum, the disclosure alternative was neither frivolous nor out of bounds and the Commission therefore had an obligation to consider it. *Cf. Laclede Gas Co. v. FERC*, 873 F.2d 1494, 1498 (D.C. Cir. 1989) ('where a party raises facially reasonable alternatives ... the agency must either consider those

alternatives or give some reason ... for declining to do so')..." *Chamber of Commerce of the United States of America v. Securities and Exchange Commission,* 412 F.3d 133; (D.C. Cir. 2005).

"An agency's ruling will be deemed arbitrary and capricious where the agency 'entirely failed to consider an important aspect of the problem [or] offered an explanation for its decision that runs counter to the evidence before the agency.' (Citations omitted) 'Moreover, an agency must account for evidence in the record that may dispute the agency's findings'..." *Port of Seattle, Wash. v. F.E.R.C.*; 499 F.3d 1016, (9th Cir. 2007).

The EEOICPA Procedure Manual states: "For a surviving child, the child **must** be a recognized natural child, stepchild (see (c) below) or a legally adopted child." *Establishing Survivorship,* EEOICPA Part B Procedure Manual, Chapter 2-0200, Section 5b, (bolding added).

These mandatory procedures were in effect at the time of respondent's Final Decision of Denial of

November 2007 limiting the definition of a child to just the three statutory examples. The effect of these provisions are not cured by adoption of new procedures promulgated September 2008, nearly a year after the Final Decision of Denial.

IV. Respondent Re-Defines the Statutory Example of Child

In its Final Decision of Denial, the respondent belatedly acknowledged the requirement to provide an alternative to just the three statutory examples and then proceeded to manufacture one. They began by stating that the "well established" definition of the statutory example of "(1) a 'recognized natural child' is an illegitimate child of an individual, who has been recognized or acknowledged as a child by that individual." Under this redefinition, a legitimate child **would not be** included in the phrase "a recognized natural child." See AR 507, App. 39a. To assume that Congress would write its definition of child entitlement as excluding a legitimate child, while including an illegitimate child, truly requires a total suspension of disbelief. Respondent then

corrected this alleged Congressional error by redefining the phrase to include the word "biological" and thus supposedly providing an alternative definition as required.

"When interpreting a statute, we must give the words their 'ordinary or natural' meaning." *Smith v. United States*, 508 U.S. 223, 228 (1993). In fact, the primary definition provided by the most authoritative sources states that the phrase "natural child" is one related by blood or begotten (i.e. biological) as distinguished from an adopted child. *The Oxford English Dictionary* defines a "natural child" as one related by blood, stating that a usage implying illegitimacy is "archaic." *Black's Law Dictionary, Seventh Edition,* defines "natural child": "1. A child by birth, as distinguished from an adopted child." *Webster's Third New International Dictionary* defines "natural child" as "begotten as distinguished from adopted," see paragraph 3 a(1). In all three sources, a recognized natural child means a biological issue as distinguished from an adopted child. By manufacturing an incorrect definition that a recognized natural child means one

that is distinguished from a legitimate child, the respondent, concludes at AR 506, App. 40a, that the definition of a recognized natural child must therefore be changed to include "biological" (although the authoritative usage already incorporates that meaning). It then utilizes this exercise as bogus evidence that it recognized that the word "includes" refers to more than just the three classes or examples mentioned in the statutory definition. But the net result is still just the three classes given in the statute: a recognized natural (biological) child, a stepchild, or an adopted child. Petitioner submits that this entire exercise of respondent in re-definition is just a convoluted and erroneous rationalization to disguise the fact that respondent failed to consider any alternative definitions to the three examples listed in the statute.

The respondent had admitted that petitioner's eligibility as a stepson is based upon the "relevant State of Washington laws." AR 155, App. 53a. Respondent had also admitted in its Conclusions of Law at AR 507, App. 39a, that "an adopted child is someone who satisfies the legal criteria for that

status under State Law." Although admitting that the status of a stepchild and the status of an adopted child are both governed by state law, the respondent rejects state law as "not controlling in EEOICPA claims adjudication process." AR 505, App. 44a. This rejection of state law primacy in interpretation of domestic relationships violates established federal common law.

> "One of the principal areas in which this Court has customarily declined to intervene is the realm of domestic relations. Long ago we observed that '[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States.' *In re Burrus*, 136 U. S. 586, 593-594 (1890). See also *Mansell v. Mansell*, 490 U. S. 581, 587 (1989) ('[D]omestic relations are preeminently matters of state law'); *Moore v. Sims*, 442 U. S. 415, 435 (1979) ('Family relations are a traditional area of state concern'). So strong is our deference to state law in this area that we have recognized a 'domestic relations

> exception' that 'divests the federal courts of power to issue divorce, alimony, and child custody decrees.' *Ankenbrandt v. Richards*, 504 U. S. 689, 703 (1992). We have also acknowledged that it might be appropriate for the federal courts to decline to hear a case involving 'elements of the domestic relationship,' id., at 705, even when divorce, alimony, or child custody is not strictly at issue.'" *Elk Grove United School District v. Newdow,* 542 U.S. 1, (2004).

In the District Court's Order, Ct. Rec. 103, App. 16a, petitioner's objections that Washington law was accepted in matters of adoption and stepchild status were confused by the Court, at the suggestion by respondent, as being objections to a change in respondent's stepchild procedures. Actually, petitioner had no such objections. Petitioner's concern was the failure of the District Court's Order to address this contradiction between respondent's acceptance of state law primacy in matters of adoption and stepchildren, with the respondent's

rejection to state law as to what else the definition "includes." There is no explanation by respondent, since they admitted that the status of a stepchild and the status of an adopted child are both governed by state law, as to how they can reject state law as being "not controlling in EEOICPA claims adjudication process," AR 505, App. 44a. Nor did the District Court or the Circuit Court address this issue.

V. **Washington State Supreme Court Decision**

The case of *In Re the Parentage of: L.B.; Sue Ellen Carvin v. Page Britain*, 155 Wn.2d, 679, *(en banc*, 2007), arose from a custody and visitation suit between the lesbian parties over a child that had been born by one party by artificial insemination, and raised by both women from infancy as its parents in a family household, until disagreement between them when the child was six resulted in the entitled litigation. The non-birth mother claimed parental rights as a *de facto* parent. The Washington Supreme Court held that status as a *de facto* parent can be established under the following requirements.

> "1) the natural or legal parent consented to and fostered the parent-like relationship; 2) the petitioner and the child lived together in the same household; 3) the petitioner assumed the obligations of parenthood without expectation of financial compensation; and 4) the petitioner has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship parental in nature...In addition, recognition of a *de facto* parent is limited to those adults who have fully and completely undertaken a permanent, unequivocal, committed and responsible role in the child's life... We thus hold that henceforth in Washington, a *de facto* parent stands in legal parity with an otherwise legal parent, whether biological, adoptive or otherwise." *In Re the Parentage of: L.B.; Sue Ellen Carvin v. Page Britain*, 155 Wn.2d, 679, *(en banc*, 2007).

There could be no question that Ray met the conditions for *de facto* parentage. The actions of Jack's birth mother leaving Jack in his infancy with

her sister, Jack's aunt Eunice, and Ray, and that Jack was again left with Eunice and Ray at the time of his mother's final illness and death, was clear evidence that he was left with his aunt and her husband Ray with the consent of his natural mother. Petitioner asserts that Jack was the *de facto* child of Ray under the unequivocal holding in *Carvin.* But respondent asserts in its final decision that *Carvin* only concerns "who may be considered a *de facto* parent, not a *de facto* child, AR 505, App. 44a. The Circuit Court's casual dismissal of *Carvin* as addressing only who could be considered a *de facto* parent, not a *de facto* child, ignores the fact that by its very terms, the Washington Supreme Court definition of a *de facto* parent is applicable only to a specific child, who becomes the *de facto* child of the *de facto* parent. The Circuit Court's acceptance of the respondent's assertion that Ray's status as a *de facto* parent does not mean that Jack is a *de facto* child of Ray's, is a complete departure from basic principles of elementary logic. The applicable rule is called "*modus ponens:* a mode of reasoning from a hypothetical proposition according to which if the

(as, if A is true, B is true; but since A is true, therefore B is true)." *Merriam-Webster's Third New International Dictionary*, 1993.[2]

Also at AR 505, App. 42a, the respondent rejects the State worker's compensation definition of child upon the false basis that the EEOICPA "is not a federal worker's [sic] compensation statute." The "Findings; sense of Congress" under 42 U.S.C. § 7384, *et. seq.*,§ 7384 (a)(7) clearly indicate a desire to establish a federal worker's compensation program. The EEOICPA is listed as a worker's compensation plan on respondent's own website as one of four compensation programs for workers. *http://www.dol.gov/esa/owcp/*. The respondent's reasons for rejecting Washington State law are carelessly uninformed and without merit.

REASONS FOR GRANTING THE WRIT:

Summary of Circuit Court Errors

1) The Circuit Court failed to consider reasonable alternatives to the three specified

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[2]It developed as part of Aristotelian logic, *The development of Modus Ponen in Antiquity*, Susanne Bobzien, 2002.

examples in § 7384 (s)(e)(3)(B) of, "recognized natural child, stepchild or adopted child." Instead the Circuit Court accepted that "The DOL considered alternatives definitions of the term 'child' but concluded none supported an award to Jordan." In fact the only alternative considered by respondent was to a "recognized natural child" which was subject to a re-definition created by the respondent on the basis that the original language of Congress excluded legitimate children.

2) The Circuit Court failed to analyze the concept that membership in a family household in a parent-child relationship would qualify a child as being within the ambit of the statutory definition of child, except to say "the argument is not persuasive."

3) The Circuit Court held equitable aspects of a child's best interests do not enter into the Act's definition of child.

4) The Circuit Court failed to recognize that since *de facto* parentage, is defined in relationship to a specific child, that such a child, the object of the definition, is necessarily a *de facto* child.

5) The Circuit Court rejected application of

Washington State law concerning the definition of child, specifically the Washington Supreme Court ruling establishing the conditions of a *de facto* parent which would provide Uncle Ray the legal custody of petitioner.

6) The Circuit Court never addressed the contradiction between respondent's acceptance of the primacy of state law in regard to adoption and stepchildren, while it rejected state law as controlling in the status of petitioner as a *de facto* child or as a dependent upon a worker with legal custody.

7) Although the Circuit Court did not dispute that Ray would qualify as a *de facto* parent of Jack, they held that Jack was never in Ray's "legal custody" as required by Washington's worker compensation definition of a "child" entitled to survivor benefits, ignoring the fact that a finding of *de facto* parentage necessarily creates legal custody. "A *de facto* parent stands in legal parity with an otherwise legal parent." *Carvin.*

8) The Circuit Court brushed aside Jack's assertion of due process protection of his status as a

member of a family household in a parent-child relationship without any analysis of the constitutional principles involved in the state or federal cases cited, except to simply deny their application without even a minimalist effort at distinguishing them.

9) The Circuit Court did not allow oral argument. Its three and a half page double-spaced memorandum decision gave such superficial analysis as to trivialize the constitutional and state law issues involved. It is no wonder they decided it was not to be published.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of certiorari.

Respectfully submitted,

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APPENDIX

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NOT FOR PUBLICATION

United States Court of Appeals

For the Ninth Circuit

JACK L. JORDAN	No. 08-35872
Plaintiff-Appellant,	D.C. No. 2:07-cv-05011-EFS
v.	
UNITED STATES DEPARTMENT OF LABOR	MEMORANDUM*
Defendant-Appellee.	

Appeal from the United States District Court for the Eastern District of Washington Edward F. Shea Presiding

Submitted October 16, 2009**

Seattle, WA

Before: RAWLINSON and CALLAHAN, Circuit Judges, and BURNS,*** District Judge.

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* This Disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without argument. See Fed. R. App. P. 34(a)(2).

*** The Honorable Larry A. Burns, United States District Judge for the Southern District of California, sitting by designation.

Jack Lee Jordan appeals from the district court's grant of summary judgment in favor of the United States Department of Labor ("DOL"). The DOL had denied Jordan's administrative claim seeking his share of a $150,000 lump sum payment under the Energy Employees Occupational Illness Compensation Program Act ("EEOICPA"), 42 U.S.C. § 7384-7385s-15.

The EEOICPA entitles certain Department of Energy ("DOE") workers to compensation for illnesses suffered due to exposure to radiation and other toxic substances while working at DOE facilities. Ray Willis Jordan ("Ray") was a covered DOE contractor who died of lung cancer in 2000. The parties do not dispute that he was a covered employee under EEOICPA. Ray was married to Eunice Welker Jordan, ("Eunice") who predeceased him.

Jordan lived with Eunice, his aunt, and Ray from 1949, when his mother died, until 1960, when he enlisted in the Marines. Although Ray and Eunice essentially had a parent-child relationship with Jordan, they did not adopt him.

In October 2002, Jordan filed a claim for survivor benefits under Part B of the EEOICPA, which provides that

covered persons or their eligible survivors may receive compensation in the form of a $150,000 lump sum payment. 42 U.S.C. § 7384s(a)(1). When the covered claimant is deceased and there is no surviving spouse, the payment "shall be made in equal shares to all children of the covered employee who are living at the time of payment." 42 U.S.C. § 7384s(e)(1)(B). The term "child" is defined as "a recognized natural child, a stepchild who lived with an individual in a regular parent-child relationship, and an adopted child." *Id.* § 7384s(e)(3)(B); *accord* 20 C.F.R. § 30.500(a)(2). The DOL ultimately denied Jordan's claim finding that he was not Ray's natural child, stepchild, or adopted child. This decision was not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

To the extent that Jordan did not waive his argument that the definition of child should cover him because he lived in a "regular parent-child relationship" (see *Portland Gen. Elec. Co. v. Bonneville Power Admin.*, 501 F.3d 1009, 1023 (9th Cir. 2007)), the argument is not persuasive. The DOL considered alternative definitions of the term "child," but concluded that none supported an award to Jordan.

The DOL did not ignore Washington State Law in determining the definition of "child" as suggested. DOL reasonably distinguished *In re Parentage of L.B.*, 122 P.3d 161 (Wash. 2005), on the grounds that In re Parentage of L.B. concerned a state's equitable concerns with the best interests of a child, which do not enter into EEOICPA's definition of a child, and addressed who can be considered a *de facto* parent, not who can be considered a *de facto* child. The DOL also reasonably rejected Jordan's argument that he was a "child" under Revised Code of Washington § 51.08.030, which is a workers' compensation provision, because Jordan was never in Ray's "legal custody" as required by that provision.

Finally, Jordan's argument that he has a due process right to the status of a child is not persuasive. He offers no authority that supports this assertion, as the cases he cites, such as *Moore v. City of E. Cleveland*, 431 U.S. 494 (1977), *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816 (1977), and *In the Matter of the Custody of Shields, Jenny Shields*, 157 Wash.2d 126 (2006), either address the right of families is less-traditional configurations to associate free of intrusion by the state, or involve questions of state statutory law.

The district court's grant of summary judgment in favor of the DOL is **AFFIRMED**.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Jack L. Jordan, an Individual,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF LABOR

Defendant.

No. CV-07-5011-EFS

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

A hearing occurred in the above-captioned matter on September 4, 2008, in Spokane. Tom H. Foulds appeared on behalf of Plaintiff Jack L. Jordan; Rolf H. Tangvald appeared on behalf of Defendant United States Department of Labor. Before the Court were Plaintiff's Motion for Summary Judgment (Ct. Rec. 82) and Defendant's Motion for Summary Judgment (Ct. Rec. 79). After reviewing the

submitted material and relevant authority and hearing oral argument, the Court is fully informed. This Order serves to memorialize and supplement the Court's rulings.

I. Background

A. EEOICPA Statutory Background

In 2000, Congress passed the Energy Employees Occupational Illness Compensation Program Act of 2000 ("EEOICPA"), 42 U.S.C. § 7384, *et. seq.* EEOICPA provides benefits to individuals with illnesses caused by exposure to radiation and other toxic substances in the course of their work related to the nuclear weapon production and testing programs of the United States Department of Energy or its predecessor agencies. 42 U.S.C. § 7384.

EEOICPA Part B allows covered employees or their eligible survivors to receive a $150,000 lump-sum payment and medical benefits for certain illnesses from radiation, beryllium, or silica exposure while working at DOE facilities. 20 C.F.R. § 30.0. EEOICPA Part E allows covered employees or their eligible survivors to receive lump-sum payments and medical benefits based on a worker's permanent impairment and/or calendar years of qualifying wage-loss. *Id.*

The Department of Labor ("DOL") is primarily

responsible for administering EEOICPA Part B and E claims. Any person seeking benefits must file a claim with the DOL's Office of Workers' Compensation Programs ("OWCP"). 20 C.F.R. §§ 30.100 & 30.101. If a person claims to be a deceased employee's survivor, sufficient evidence of the claimed relationship must be furnished.

After reviewing a claim, the OWCP issues a recommended decision. 20 C.F.R. § 305. The claimant then has sixty (60) days to file objections with the Final Adjudication Branch ("FAB"). 20 C.F.R. § 310. The FAB will consider a claimant's objections and hold a hearing, if requested, before issuing the final agency decision. 20 C.F.R. §§ 30.314 & 30.316. An OWCP recommended decision automatically becomes the final agency decision one year after the agency receives the claimant's objections. 20 C.F.R. § 30.316(c). This provision safeguards against unnecessary agency delay.

B. Plaintiff's EEOICPA Claims

On October 15, 2002, Plaintiff filed an EEOICPA Part B claim seeking benefits for his late uncle's death from lung cancer. Plaintiff's uncle was a former worker at the Hanford Nuclear Site and qualified for EEOICPA benefits.

Plaintiff claimed he was an eligible surviving child because he had a parent-child relationship with his uncle.

On December 17, 2002, the Division of Energy Employees Occupational Illness Compensation ("DEEOIC") recommended denying Plaintiff's Part B claim for failure to establish that he is an eligible surviving child. A month later, the FAB vacated the recommended decision, remanding the claim for further development.

On April 12, 2003, Plaintiff send additional information to the DOL, including why he considered his uncle a father. On September 23, 2003, the Chief of the Branch of Policies, Regulations and Procedures (a division of the DOL) concluded Plaintiff, in the absence of additional information, does not qualify as an eligible surviving child. On October 3 and 21, 2003, the DEEOIC sought additional information about Plaintiff's relationship with his uncle. Plaintiff did not respond.

On June 9, 2005, Plaintiff's representative informed the DEEOIC that his client wished to file a Part E claim. The DEEOIC received Plaintiff's Part E claim the following week. On October 27, 2005, the DEEOIC requested additional documentation to show proof of adoption.

The following week on November 3, 2005, Plaintiff's representative sent a letter to the DEEOIC arguing that Plaintiff qualifies as an eligible surviving child based upon a Washington Supreme Court case released that day discussing *de facto* parentage. On November 16, 2005, the DEEOIC recommended denying Plaintiff's Part B and Part E claims. This recommendation did not fully address Plaintiff's recently raised legal arguments.

On January 12, 2006, Plaintiff objected to the recommendation and requested an oral hearing, which took place on March 30, 2006. At the hearing, Plaintiff's representative raised the *de facto* parent legal argument.

On July 15, 2006, the FAB forwarded Plaintiff's claim to the DEEOIC's Branch of Policies, Regulations and Procedures ("BPRP") requesting guidance on Plaintiff's legal arguments. On December 12, 2006, the BPRP requested a legal opinion from the Office of the Solicitor of Labor ("SOL"). On February 26, 2007, the SOL issued a legal memorandum briefing Plaintiff's arguments. The following week, the BPRP sent the legal memo to the FAB, satisfying the FAB's earlier request for legal guidance.

Meanwhile, the DEEOIC's recommended decision automatically became the final agency decision on January

17, 2007. Plaintiff sought judicial review with this Court on March 9, 2007. On April 30, 2007, the Director vacated the DOL's final agency decision, remanding the case to fully consider Plaintiff's recent raised *de facto* parentage argument. After reviewing Plaintiff's arguments, the DOL issued its final agency decision denying Plaintiff's claim for benefits on November 7, 2007. (Ct. Rec. 34.)

II. Discussion

A. Standard

The administrative Procedures Act (APA) sets forth standards governing judicial review of decisions made by federal administrative agencies. *Mountain Rhythm Res. v. FERC*, 302 F.3d 958, 963 (9th Cir. 2002). APA section 706(2)(A) provides that a reviewing court may set aside agency decisions found to be "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law." 5 U.S.C. § 702(2)(A). The arbitrary and capricious standard is appropriate when resolving factual disputes implicating substantial agency expertise. *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 376 (1989). Review under the standard is narrow and the reviewing court may

not substitute its judgment for that of the agency. *U.S. Postal Serv. v. Gregory*, 534 U.S. 1, 6-7 (2001); *Arrington v. Daniels*, 516 F.3d 1106, 1112 (9th Cir. 2008). The agency, however, must articulate a rational connection between the facts found and the conclusions made. *Kern County Farm Bureau v. Allen*, 450 F.3d 1072, 1076 (9th Cir. 2006) (internal quotations and citations omitted.)

The reviewing court must determine whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. *Marsh*, 490 U.S. at 378. The court may reverse under the arbitrary and capricious standard only if the agency relied on factors that Congress did not intend for it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. *Envtl. Prot. Info. Ctr. v. Simpson Timber Co.*, 255 F.3d 1073, 1078 (9th Cir. 2001); *Port of Seattle, Wash. v. F.E.R.C.*, 499 F.3d 1016, 1035 (9th Cir. 2007). Finally, an agency's decision can be upheld only on the basis of the reasoning in that decision.

Anaheim Mem'l Hosp. v. Shalala, 130 F.3d 845, 849 (9th Cir. 1997).

B. Statutory Definition of Child

EEOICPA regulations define "child" as a "recognized natural child, a stepchild who lived with an individual in a regular parent-child relationship, and an adopted child...." 42 U.S.C. § 7384s(e)(3)(B). The DEEOIC has exclusive discretion to interpret this definition. 20 C.F.R. § 30.1. Noting the expansive statutory language, the DEEOIC recently expanded "child" from its original definition to include: (1) legitimate children, and (2) posthumously born legitimate children. (AR 506.) As defined under the EEOICPA, "child" is, therefore, limited to biological children, stepchildren, or adopted children. *Id.*

C. FAB's Final Denial Decision

Plaintiff argues that FAB's final denial decision should be vacated because it arbitrarily and capriciously failed to consider (1) enlarging the statutory definition of "child" to include *de facto* children, (2) relevant state law definitions of "child" in statutory interpretation, and (3) the proper nature of his relationship with Ray Jordan. Defendant responds that FAB's decision should not be overturned because it is neither arbitrary or capricious.

1. FAB Consideration of *de facto* Children Under the EEOICPA

Plaintiff first alleges that FAB failed to consider expanding the statutory definition of "child" to include *de facto* children as set forth in *In re Parentage of L.B.*, 155 Wn.2d 679 (2005). (Ct. Rec. 82 at 3.) Defendant responds that not only did FAB's decision consider including *de facto* children, but also it extensively analyzed the proper scope of "child" under the EEOICPA. (Ct. Rec. 88 at 4.)

In *In re Parentage of L.B.*, the Washington Supreme Court considered whether a parent figure who participated in raising a non-biological child can be considered a *de facto* parent and assigned legally-binding visitation rights. The court concluded that an individual who is not a biological, adoptive, or stepparent can be considered a *de facto* parent if they satisfy a four-part test[1]. Jordan qualifies as his *de facto* parent under *In re Parentage of L.B.'s* four-part test.

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[1] An individual must prove that: (1) the natural or legal parent of the child consented to and fostered the parent-like relationship, (2) the individual and the child lived together in the same household, (3) the individual assumed the many obligations of parenthood without expectation of financial compensation, and (4) the individual has been in a parental role for a length of time sufficient to have established a

Contrary to Plaintiff's assertion, FAB's final decision did analyze *In re Parentage of L.B.*, determining that it did not apply to EEOICPA claims because (1) equitable concerns such as the child's best interests – paramount in state dependency cases – have no place in EEOICPA claims adjudication, (2) the case created and defined *parental* rights and obligations, not *children's* rights and obligations, and (3) Washington law is not controlling on the EEOICPA claims adjudication process. FAB further noted that under DEEOIC interpretations, dependency alone is insufficient to establish "child" status. (AR 506.) Given DEEOIC's broad discretion to interpret the definition of "child" and FAB's lengthy consideration of *In re Parentage of L.B.*, the FAB sufficiently considered Plaintiff's *de facto* child argument and articulated a rational basis for declining to extend coverage. FAB's decision is neither arbitrary nor capricious.

2. Applicability of Washington State Law

Plaintiff next argues that the DOL improperly abandoned Washington law as guidance for its statutory interpretation of "child" and, instead, substituted its own

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bonded, dependent parental relationship with the child. *In re Parentage of L.B.*, 155 Wn.2d at 708.

administrative judgment. (Ct. Rec. 82 at 7.) Defendant responds that the alleged "abandonment" of state law as guidance exclusively affected stepchild claims unrelated to Plaintiff's case. (Ct. Rec. 88 at 6.)

While regulatory agencies do not establish rules of conduct to last forever, an agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. at 57.

Here, Defendant was not required to explain its 2003 procedural modification to its claims adjudication process because the modification only affected stepchild claims. Plaintiff's claim is not based on stepchild status; rather, Plaintiff insists he qualifies as a *de facto* child. Accordingly, the DOL's modifications are irrelevant to Plaintiff's claim and Defendant is not required to provide a reasoned analysis for the change.

Plaintiff similarly fails to identify any authority that requires the agency to apply Washington law in interpreting the statutory definition of "child." To the contrary, 20 C.F.R. § 30.1 provides that the Director of OWCP and his or her designees have exclusive authority to

administer, interpret, and enforce EEOICPA's provisions. FAB may reasonably conclude, therefore, that Washington law is not controlling in analyzing Plaintiff's claim. (Ct. Rec. 505.)

3. Portrayal of Plaintiff's Relationship with Ray Jordan

Plaintiff next argues that Defendant distorted the factual record to diminish his status as Ray Jordan's child. Defendant responds that these allegations are unfounded and denies misrepresenting, mischaracterizing, or omitting any facts.

There is no evidence to support Plaintiff's assertion that facts were distorted to diminish his relationship with Ray Jordan. Moreover, even assuming that Plaintiff and Ray Jordan exemplified a paradigmatic parent-child relationship, FAB can still deny Plaintiff's claim because he does not fall within the statutory definition of "child." There is no evidence demonstrating that FAB's factual findings lead to an arbitrary or capricious decision.

4. Due Process

Finally, Plaintiff argues that he has a due process right to have his *de facto* child status considered within the statutory definition because he maintained an intimate,

long-term familial relationship with Ray Jordan. Defendant again responds that Plaintiff's status and relevant familial circumstances were fully considered in the FAB decision.

Plaintiff's argument is nothing more than a restatement of his original argument, that is, that FAB failed to consider expanding the statutory definition of "child" to include *de facto* children. For reasons articulated above, Plaintiff's claim is properly denied. Plaintiff cannot show that the FAB failed to consider his status within Ray Jordan's family or his *de facto* child argument.

III. CONCLUSION

The Court recognizes and is respectful of Plaintiff's parent-child relationship with Ray Jordan. But it is the DOL's responsibility – not the Court's – to thoughtfully consider a claimant's eligibility for the EEOICPA $150,000 lump-sum payment.[1] The record reflects that Defendant did thoughtfully consider Plaintiff's claim, deliberately and

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[1] Plaintiff insinuated at the hearing that Defendant deliberately stalled deciding whether coverage existed in an effort to avoid payment. Defendant squelched this suggestion by noting it is undisputed that Ray Jordan's step-son is eligible to receive $150,000 lump-sum payment. The only question is whether this payment will be divided between Plaintiff and Mr. Jordan's step-son or not.

serially examining each piece of new evidence that Plaintiff provided. Because FAB fully considered Plaintiff's arguments before denying them – which was within their authority to do – there is no basis to overturn their decision.

Accordingly, **IT IS HEREBY ORDERED**:

1. Plaintiff's Motion for Summary Judgment (Ct. Rec. 82) is **DENIED**;
2. Defendant's Motion for Summary Judgment (Ct. Rec. 79) is **GRANTED**;
3. Judgment shall be entered in Defendant's favor; and
4. This file shall be **closed**.

IT IS SO ORDERED. The District Court Executive is directed to enter this order and provide copies to counsel.

DATED this 5th day of September 2008.

s/ Edward F. Shea

EDWARD F. SHEA

United States District Judge

U.S. DEPARTMENT OF LABOR

EMPLOYMENT STANDARDS ADMINISTRATION OFFICE OF WORKERS' COMPENSATION PROGRAMS DIVISION OF ENERGY EMPLOYEES OCCUPATIONAL ILLNESS COMPENSATION FINAL ADJUDICATION BRANCH

EMPLOYEE: Ray Willis Jordan

CLAIMANTS: Jack L. Jordan
William C. Jordan

FILE NUMBER: [Redacted]

DOCKET NUMBERS: 37038-2003
43145-2006
10034810-2006
10042121 -2006

DECISION DATE: November 7, 2007

NOTICE OF FINAL DECISION FOLLOWING REVIEW OF THE WRITTEN RECORD

This is the decision of the Final Adjudication Branch (FAB) concerning the above claims for compensation under Part B

and Part E of the Energy Employees Occupational Illness Compensation Program Act of 2000, as amended (EEOICPA), 42 U.S.C. § 7384 *et seq.* For the reasons stated below, Jack L. Jordan's claim for survivor benefits under Part B and Part E are denied. William C. Jordan's claim for survivor benefits under Part B is accepted, but his claim under Part E is denied.

STATEMENT OF THE CASE

On October 15, 2002, Jack L. Jordan (Jack) filed a Form EE-2 with the Seattle district office of DEEOIC in which he claimed for survivor benefits under Part B of EEOICPA as a child of Ray Willis Jordan (Ray). In support of his claim, he alleged that Ray had been employed by J.A. Jones Construction, a Department of Energy (DOE) subcontractor at the Hanford site, and that Ray had been diagnosed with lung cancer in 1999. Jack submitted a large number of documents in support of his claim that included, among other things: copies of a September 24, 1992 court order documenting the legal change of his name from "Jackie Lee Ackelson" to "Jack Lee Jordan" and his October 6, 1992 amended birth certificate with this new name[1]; medical

[1] On this birth certificate, Jack is reported to be the child of "Lulu Belle Welker" and "John Ackelson," and Lulu Belle is reported to be married.

evidence of Ray's lung cancer; copies of the death certificates for both Ray and Ray's wife, Eunice Welker Jordan (Eunice); a copy of "Letters Testamentary" documenting that Jack was an executor of Ray's estate; a U.S. Marine Corps Form D-214 noting Jack's use of the name "Jack Lee Jordan" when he was transferred to the Marine Corps Reserve on September 4, 1964; and a September 21, 2001 statement in which Jack related the following about his childhood:

> As my real dad was unknown. My mother died when I was 6. Johnny Ackelson was a family friend of my mom's. Just to give me a last name as she was unwed & pregnant with me. My Dad Ray Jordan & My Mom Eunice Jordan actually was my uncle & aunt but I lived with them from the time I was 3 years old. So I consider them my Dad & Mom. As I joined the USMC with the Jordan name. . .

On December 16, 2002, the Seattle district office verified Ray's employment by consulting the ORISE database and on December 17, 2002, it issued a recommended decision to

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The informant for the birth certificate is listed as "Mrs. Myrtle Welker" (Lulu Belle's mother).

deny Jack's Part B claim and transferred the claim to the Seattle Final Adjudication Branch (FAB). The recommendation to deny was based on the conclusion that Jack had failed to submit sufficient evidence to establish his eligibility as a surviving child of Ray. On January 29, 2003, the Seattle FAB issued an order remanding the claim to the Seattle district office for further development on the issue of whether Jack was Ray's stepchild. In that order, the Seattle FAB noted that new procedures had gone into effect shortly after the recommended decision had been issued that required all claims in which claimants were alleging to be stepchildren of deceased covered workers to be forwarded to the National Office of DEEOIC for referral to the Office of the Solicitor, and directed the Seattle district office to comply with those procedures upon completion of further development on the question of whether Jack was Ray's stepchild.

By letter dated February 11, 2003, Jack's representative submitted a February 6, 2003 statement from Ray's sister, Myreta P. Shirley, who stated the following:

> Jack came to live with Ray and Eunice Jordan in 1946 and he was three years old at the time. He lived with them until he was 18 or 19. At that time he joined the Marines. Ray was his soul [sic] provider during those years and loved him as his son. Their relationship has always been that of a father and son and continued until Ray passed away a few years ago.

Jack's representative also submitted copies of Jack's "Pupil Health Card" and "Pupil's Cumulative Record" from the Kiona-Benton School District, both of which listed Jack's last name as "Wyman" (crossed out and replaced with "Jordan") and noted that he lived with his "Uncle." The "Pupil's Cumulative Record" also listed "John Wyman" as Jack's father. Shortly thereafter, William C. Jordan (William) filed a claim for survivor benefits on March 31, 2003 and alleged that he was the stepson of Ray.

In an April 10, 2003 inquiry, the Seattle district office asked Jack who John Wyman was (his father on the "Pupil's Cumulative Record"). In an April 12, 2003 reply, Jack stated the following:

> My mother Lulu married Clyde Wyman [in] 1945[.] They had (2) girls Viola & Gladys. . .Clyde was my stepfather until Lulu's death in 1949 at which time the girls & I were separated as Clyde didn't like me as I wasn't his child. The girls were adopted out and I went with my parents Ray & Eunice Jordan.
> [I lived with Eunice and Ray in] 1943-1944 as [Lulu] was unwed. Then my mother Lulu Belle Welker (Wyman) passed away [January] 23, 1949. I lived with Ray & Eunice Jordan from 1949-1960. They were my sole survivorship [sic]. Then I went in USMC 1960.

In a response to a separate April 10, 2003 inquiry that was received by the Seattle district office on April 23, 2003, William indicated that his mother Eunice had married Ray (his alleged stepparent) on October 24, 1940 when he was five years old, and that he had resided in their household for the next 15 years. William also submitted a copy of his birth certificate, which showed that his mother was "Eunice Cleo Welker," and his father was "Charles B. Kay."

By letters dated May 1, 2003, the district office notified both Jack and William that the case had been referred to

the National Institute for Occupational Safety and Health (NIOSH) for reconstruction of Ray's radiation dose. Thereafter, on June 19, 2003, the district office transferred the case to the National Office of DEEOIC for referral to the Office of the Solicitor as directed in the January 29, 2003 remand order of the Seattle FAB. However, rather than taking this action[2], the National Office returned the case to the district office on September 29, 2003 with a memorandum from the Chief of the Branch of Policies, Regulations and Procedures (BPRP) of the same date. In that memorandum, the Chief reviewed the evidence then in the case file and concluded that while William met the statutory definition of Ray's "child," Jack would not absent the submission of additional evidence showing that he had been legally adopted by Ray. Upon return of the file, the Seattle district office wrote to Jack on October 3 and 21, 2003 and requested that he submit any evidence in his possession that would establish that he had been legally

[2] Subsequent to FAB's remand of the case for referral to the Office of the Solicitor, DEEOIC's policy in this area changed again such that the contemplated referral was not required. This later change in policy was documented in EEOICPA Transmittal No. 04-01 (issued October 22, 2003).

adopted by Ray. No response was received to these requests.

No further action took place with respect to this matter pending receipt of NIOSH's dose reconstruction report until June 9, 2005, on which date Jack's representative informed the district office that his client wished to expand his Part B claim to include a claim under the recently enacted Part E of EEOICPA. On October 27, 2005, the district office sent a third letter to Jack stating that while he had provided sufficient evidence to show that he had lived as a dependent in his uncle and aunt's household, no documentation had been provided showing that he had ever been adopted by his uncle. In a November 3, 2005 response to that letter, Jack's representative argued that because the definition of "child" in EEOICPA is inclusive rather than exclusive, Jack met the definition of "child" by being the *"de facto* child" of Ray, based on a recent state court decision in a Washington child visitation case (issued that same day) that adopted an equitable theory of *de facto* parentage. In the visitation case cited, the court created a four-part test

for an individual to be a considered a *"de facto* parent" and to be granted the rights and privileges of a parent.[3]

Jack's representative also argued that Jack should be considered a child of Ray under the definition of the term "child" that appears in Title 51 of the Washington Revised Code, which codifies that state's industrial insurance law.[4] The term "child" is defined therein as, among other things, a "dependent child that is in legal custody and control of the worker." The term "dependent" under that title is defined as including relatives of the worker who at the time of the accident are actually and necessarily dependent on the worker. Through a letter dated November 10, 2005, Jack's representative added to his prior argument by alleging that "Ray would have adopted [Jack], but it wasn't necessary at the time because the schools he attended and the military accepted Ray as Jack's father and allowed Ray to sign legal documents on Jack's behalf when he was still a minor."

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[3] *In re Parentage of L.B.*, 122 P.3d 161 (Wash. 2005).

[4] Wash. Rev. Code § 51.08.030 (2006).

On October 18, 2005, the Seattle district office received the "NIOSH Report of Dose Reconstruction under EEOICPA," dated September 29, 2005, which provided estimated doses of radiation to the primary cancer site of the lung. Based on these dose estimates, the district office calculated the probability of causation (PoC) for Ray's lung cancer by entering his specific information into a computer program developed by NIOSH called NIOSH-IREP. The PoC was determined using the "upper 99% credibility limit," which helps minimize the possibility of denying claims of employees with cancers that are likely to have been caused by occupational radiation exposures. The PoC for the primary cancer of the lung was determined to be 52.89% using NIOSH-IREP. Based on this PoC, the Seattle district office issued a November 16, 2005 recommended decision to accept William's Part B claim. However, it recommended denial of William's Part E claim on the ground that he was not a "covered child" under that other Part. It also recommended denying Jack's Part B and E claims on the ground that he had failed to establish that he was a surviving child of Ray. The recommended decision, however, did not fully discuss the legal arguments for the expansion of the term "child" made by Jack's

representative. In a January 12, 2006 letter that was received on January 17, 2006, Jack's representative objected to this recommended decision and requested an oral hearing before the Seattle FAB, which took place on March 30, 2006. At the hearing, Jack's representative made the same arguments he had made in his written objections.

On July 15, 2006, the Seattle FAB returned the case to BPRP for guidance on the legal arguments raised by Jack's representative at the March 30, 2006 hearing. On December 12, 2006[5], BPRP requested a legal opinion on the matter from the Office of the Solicitor and on February 26, 2007, the Office of the Solicitor provided BPRP with a legal opinion that evaluated the arguments raised by Jack's representative. On March 1, 2007, BPRP contacted the Seattle FAB and advised it of the guidance it had received. However, by that point in time, the November 16, 2005 recommended decision had automatically become a "final" decision of the FAB on January 17, 2007 pursuant to 20 C.F.R. § 30.316(c), the one-year anniversary of the date the

[5] This request was misdated by BPRP as April 13, 2004. It was actually received in the Office of the Solicitor on December 12, 2006.

representative's objections to the recommended decision were received by the Seattle FAB.

On March 9, 2007, Jack filed a petition in the United States District Court for the Eastern District of Washington seeking review of the January 17, 2007 "final decision" on his claim under Parts B and E of EEOICPA (Civil Action No. CV-07-5011 -EFS). Shortly thereafter, the Director of DEEOIC issued an order on April 30, 2007 vacating that same "final decision" on the claims of both Jack and William and retuning them to the Seattle district office for further development and consideration of the Office of the Solicitor's February 26, 2007 opinion, to be followed by the issuance of new recommended and final decisions. The case was subsequently transferred to the national office of DEEOIC for further action in light of the filing of the above-noted petition.

On September 14, 2007, the national office of DEEOIC issued a recommended decision: (1) to deny Jack's claim for survivor benefits under Parts B and E on the ground that he was not a surviving "child" of Ray, as that statutory term is defined in §§ 7384s(e)(3) and 7385s-3(d)(3) of

EEOICPA; (2) to accept William's claim for survivor benefits under Part B on the ground that as Ray's stepchild, he was a surviving "child" of Ray under § 7384s(e)(3); and (3) to deny William's claim for survivor benefits under Part E on the ground that although he was a "child" of Ray under § 7385s-3(d)(3), he did not meet the definition of a "covered child" in § 7385s-3(d)(2). The case was transferred to the FAB and on October 3, 2007, it received William's signed, written waiver of all objections to the September 14, 2007 recommended decision. On October 17, 2007, William also submitted a signed statement indicating that had not received any money from a tort suit for Ray's radiation exposure, and that he had not been convicted of fraud in connection with any application for or receipt of EEOICPA benefits or any other state or federal workers' compensation benefits. On September 27, 2007, the FAB received written objections to the September 14, 2007 recommended decision and a request for review of the written record from Jack's representative, dated September 26, 2007.

OBJECTIONS

In his September 26, 2007 submission, Jack's representative objected to the seventh "Conclusion of Law"

in the recommended decision, which is the one that concluded that Jack was not a surviving "child" of Ray under either Part B or Part E of EEOICPA and rejected the representative's contentions that Washington workers' compensation law and a child visitation decision supported Jack's claim. The representative repeated his earlier argument regarding the non-exhaustive nature of the definition of "child" under EEOICPA and alleged that DEEOIC ignored this point when it "made its recommended decision of denial on the basis that Jack Jordan does not qualify as a surviving child of Ray Jordan since Jack was neither a recognized natural child, a stepchild or an adopted child. . . ."[6]

Jack's representative also repeated his argument that Washington workers' compensation law should apply in Jack's EEOICPA claim because EEOICPA is a "federal

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[6] Despite this assertion, the seventh "Conclusion of Law" in the September 14, 2007 recommended decision actually stated that Jack is not a "child" of Ray "because he is not a *biological* child of Ray, or a stepchild of Ray, or an adopted child of Ray." (emphasis added) The significance of the term "biological" in the quoted phrase is discussed at length below.

worker's *[sic]* compensation statute." Based on this premise, the representative asserted that the concept of dependence alone should be determinative of Jack's status as Ray's child.

Finally, the representative argued that the "general rule of law" pronounced in the child visitation case was "not limited to the facts in the particular case." Rather, he asserted, "the application of the *de facto* concept is broadly [sic] subject only to the factors enumerated in the general rule developed in the decision." The representative then quoted from the portion of the decision in which the court set out four criteria that an individual would have to meet in order to have "standing as a *de facto* parent" in a child visitation proceeding, and asserted that Jack was Ray's "*de facto* child."

After considering the recommended decision and all of the evidence in the case file, the FAB hereby makes the following:

FINDINGS OF FACT

1. Jack and William filed claims for survivor benefits under Part B of EEOICPA on October 15, 2002 and March 31,

2003, respectively, and both later expanded their claims to include Part E.

2. Ray was employed at the Hanford facility by DOE subcontractors from January 1, 1950 to April 15, 1955, from September 14, 1956 to March 15, 1957, from March 22, 1957 to April 26, 1957, from March 3 to 4, 1960, and from September 14, 1960 to March 4, 1977.

3. On July 1, 1999, Ray was diagnosed with lung cancer. The date of this diagnosis was after he had begun covered employment.

4. NIOSH reported annual dose estimates for the lung from the date of initial radiation exposure during covered employment to the date of the cancer's first diagnosis. A summary and explanation of the information and methods applied to produce these dose estimates, including Jack's and William's involvement through their interviews and reviews of the draft dose reconstruction report, are documented in the "NIOSH Report of Dose Reconstruction under EEOICPA" dated September 29, 2005.

5. Using the dose estimates from NIOSH's September 29, 2005 report, DEEOIC determined that the probability of causation (PoC) was 52.89% and established that it was "at

least as likely as not" that Ray's lung cancer was sustained in the performance of duty.

6. Jack was born on [redacted], 1942 and is the child of Lulu Belle Welker and an unknown father. From 1943 to 1944, he lived with his uncle Ray and his aunt Eunice (Lulu Belle's sister). In 1945, Lulu Belle married Clyde Wyman, and Jack was reunited with his mother and lived with her and Clyde, his stepfather. Lulu Belle Wyman died on January 23, 1949, after which Jack was again sent to live with his aunt and uncle. Jack's stepfather Clyde died in 1952. Jack lived with his uncle Ray, his aunt Eunice and his cousin William (Eunice's child by a previous marriage) from 1949 until he enlisted in the U.S. Marine Corps in 1960.

7. William is the stepchild of Ray as established by his birth certificate, his school records, and the marriage of his mother Eunice to Ray.

8. At the time of Ray's death, William was not under the age of 18, or under the age of 23 and continuously enrolled as a full-time student in an institution of higher learning, or any age and incapable of self-support.

Based on the above-noted findings of fact, and after considering the objections to the recommended decision in this case, the FAB hereby makes the following:

CONCLUSIONS OF LAW

The first issue in this case is whether Ray qualifies as a "covered employee with cancer" for the purposes of Part B of EEOICPA. For this case, the relevant portion of the definition of a "covered employee with cancer" is "[a] Department of Energy contractor employee who contracted that cancer after beginning employment at a Department of Energy facility, "if and only if that individual is determined to have sustained that cancer in the performance of duty in accordance with section 7384n(b) of this title." 42 U.S.C. § 7384l(9)(B). As found above, Ray was employed at the Hanford facility by DOE subcontractors for intermittent periods from January 1, 1950 to March 4, 1977, and was first diagnosed with lung cancer after he had begun working at the Hanford facility.

In accordance with 42 U.S.C. § 7384n(d), NIOSH produced dose estimates of the annual radiation exposures to Ray's lungs, and DEEOIC calculated the PoC for his lung cancer

based on those estimates consistent with § 7384n(c)(3). Since the PoC was calculated to be 52.89%, it established that it was "at least as likely as not" that Ray's lung cancer was sustained in the performance of duty under § 7384n(b). Therefore, Ray qualifies as a "covered employee with cancer" under Part B, as that term is defined by § 7384l(9)(B), because he was employed at a DOE facility by DOE subcontractors and sustained cancer in the performance of duty. As a result, his cancer is an "occupational illness" under Part B, as defined by § 7384l(15), and he is also a "covered employee," as that term is defined by § 7384l(1)(B). Pursuant to 42 U.S.C. § 7385s-4(a), this conclusion also constitutes a determination under Part E of EEOICPA that Ray contracted his lung cancer through exposure to a toxic substance at a DOE facility. However, because Ray is a *deceased* covered employee, only his eligible survivors are entitled to share in the compensation payable under Part B and Part E of EEOICPA.

The second issue in this case is whether Jack or William is a "child" of Ray under both Parts B and E of EEOICPA. The statutory term "child," which has the same definition in

both Parts B and E, "includes a recognized natural child, a stepchild who lived with an individual in a regular parent-child relationship, and an adopted child." 42 U.S.C. §§ 7384s(e)(3)(B), 7385s-3(d)(3). Both of these definitions use the non-exhaustive term "includes" and identify three classes of persons that are considered to be children of an individual for purposes of paying survivor benefits under Parts B and E of EEOICPA.

There are well-established definitions for the three classes of persons included in the two statutory provisions at issue: (1) a "recognized natural child" is an illegitimate child of an individual, who has been recognized or acknowledged as a child by that individual; (2) a "stepchild" is someone who meets the criteria currently described in Chapter 2-200.5c (September 2004) of the Federal (EEOICPA) Procedure Manual; and (3) an "adopted child" is someone who satisfies the legal criteria for that status under state law.

The use of the term "includes" in both § 7384s(e)(3) and § 7385s-3(d)(3) is evidence that Congress intended the term "child" to refer to more than just the three classes of persons noted above, as is the fact that those three specified

classes do not include legitimate issue (and posthumously born legitimate issue). Thus, the definition of the term "child" is properly left to DEEOIC as the agency that is charged with the administration of the compensation programs established by EEOICPA. *See* 20 C.F.R. § 30.1 (2007). As an exercise of that authority, DEEOIC concludes that there is no dispute that legitimate issue are children of an individual. Furthermore, unrecognized or unacknowledged illegitimate issue (and posthumously born illegitimate issue) also fall within the definition of "child" since denying EEOICPA survivor benefits to these other illegitimate children would violate the constitution.[7] For brevity's sake, DEEOIC will use the term "biological" children to mean *all* issue of an individual (including posthumously born issue), whether legitimate or illegitimate. Under this terminology, a "recognized natural child" is one type of biological child. Accordingly, DEEOIC concludes that a "child" of an individual under both Part B and Part E of EEOICPA can only be a biological child, a stepchild, or an adopted child of that individual.

[7] *See Weber v. Aetna Cas. & Sur. Company*, 406 US. 164 (1972).

As noted above in the "Objections" section of this decision, Jack's representative argues that Washington workers' compensation law should apply in Jack's EEOICPA claim because EEOICPA is a "federal worker's *[sic]* compensation statute." In his view, Jack should be found to be a "child" under EEOICPA because he meets the definition of a "child" in Title 51 of Washington's Revised Code, which defines a "child" as "every natural born child, posthumous child, stepchild, child legally adopted prior to the injury, child born after the injury. . .and dependent child in the *legal custody* and control of the worker. . . ."(emphasis added).[8] However, there is no evidence in the case file that Jack is the natural born child, posthumous child, stepchild, child legally adopted prior to the injury or child born after the injury of Ray.

There is also no allegation or evidence in the case file that Ray (or his wife, Eunice) ever had legal custody of Jack. Instead, it appears that after the death of his mother, Jack merely lived with his aunt and uncle who had, at most, *physical* custody of their nephew. Even assuming that Ray had "legal custody" of Jack (a prerequisite of the

[8] Wash. Rev. Code § 51.08.030 (2006).

definitional phrase at issue), there is nothing in either § 7384s(e)(3) or § 7385-3(d)(3), or in the Act as a whole, that suggests that a person claiming to be a "child" of a deceased covered employee should be able to establish that status by proving merely that they are or were "dependant" on that individual. Therefore, DEEOIC has concluded that persons who are or were only "dependant" on an individual are not "children" of that individual under EEOICPA, which is not a "federal worker's *[sic]* compensation statute (those types of statutes are "wage-replacement statutes[9]), as Jack's representative believes, where issues of dependency are often relevant to questions of survivor eligibility.[10]

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[9] Rather than replacing an injured worker's wages during a period of disability with regular, periodic payments consisting of a set percentage of the worker's pre-injury wages, EEOICPA benefits are single, lump-sum payments in dollar amounts that are set by the terms of the Act. For an in-depth discussion of the "wage-replacement" nature of workers' compensation statutes, see *Larson's* Workers' Compensation *Law*, §§1.02 and 80.05[3] (2006).

[10] DEEOIC's position that dependency alone does not establish that an individual is a "child" is consistent with other systems where actual familial ties are paramount, such as Washington's statutory provision on the subject of intestate succession. *See* Wash. Rev. Code § 11.04.015.

Jack's representative also argues that Jack should be considered a "*de facto* child" of Ray based on a recent decision in a visitation dispute in Washington. The dispute involved two parties who could not legally marry one another but had agreed to raise a biological child of one of the parties together. When the party who had no biological or legal relationship to the child sued to obtain visitation rights after the parties had terminated their agreement, the court considered whether the party was a "*de facto* parent."[11] Jack's representative argues that Ray would have met the court's four-part test[12] to be his client's "*de facto* parent" and as a consequence, Jack should be

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[11] Before an individual who is not a biological, adoptive or stepparent can be considered a "*de facto* parent" of a child, such individual must prove that: the natural or legal parent of the child consented to and fostered the parent-like relationship; the individual and the child lived together in the same household; the individual assumed the many obligations of parenthood without expectation of financial compensation; and the individual has been in a parental role for a length of time sufficient to have established a bonded, dependent parental relationship with the child. *In re Parentage of L.B.*, 122 P.3d at 176.

[12] Without conceding that the court's four-part test is applicable in this matter, DEEOIC notes that there is no evidence in the file that Lulu

considered to be the *"de facto* child" of Ray. There are, however, two flaws in this argument. First, both the decision at issue and subsequent cases that have relied upon it are clearly within the state law realm of child custody and for parental rights. State courts in these types of cases are primarily concerned with the "best interests of the child," which is an equitable concern that does not enter into EEOICPA's definitions of "child," and involve the creation or definition of rights and obligations of parents, not children. Secondly, the decision cited by Jack's representative only contains a discussion of who can be considered a "*de facto* parent," not a "*de facto* child."

Therefore, the representative's reliance on this decision is flawed not only because it is not controlling in the EEOICPA claims adjudication process, but also because it is based on an overly expansive reading of what the court actually stated.

Returning to the second issue in this case, DEEOIC concludes that William is a "child" of Ray under Part B, as

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Belle Wyman gave her consent to have her son live with Eunice and Ray after her death in 1949.

that term is defined in § 7384s(e)(3)(B), because he is Ray's stepchild. William is also a "child" of Ray under Part E, as that term is defined in § 7385s-3(d)(3), for the same reason-because he is Ray's stepchild. However, DEEOIC concludes that Jack is not a "child" of Ray under either Part B or Part E because he is not a biological child of Ray, or a stepchild of Ray, or an adopted child of Ray.

The third issue in this case is whether Jack or William is a "covered child" of Ray under Part E of EEOICPA. In order to be eligible to receive a payment as a "child" of a deceased covered employee under Part E, a child of that employee must be a "covered child," which is defined as "a child of the employee who, as of the employee's death--(A) had not attained the age of 18 years; (B) had not attained the age of 23 years and was a full-time student who had been continuously enrolled as a full-time student in one or more educational institutions since attaining the age of 18 years; or (C) had been incapable of self-support." 42 U.S.C. § 7385s-3(d)(2).

In this case, while William is a "child" of Ray under Part E, he is not a "covered child," as that term is defined in §

7385s-3(d)(2), because at the time of Ray's death on February 21, 2000, he was not under the age of 18, or under the age of 23 and continuously enrolled as a full-time student in an institution of higher learning, or any age and incapable of self-support. As for Jack, since he is not a "child" of Ray, as that term is defined in § 7385s-3(d)(3), because he is not a biological child, a stepchild or an adopted child of Ray, he cannot be a "covered child" of Ray under Part E because an individual alleging that status must also be a "child" in order to be a "covered child" under the terms of § 7385s-3(d)(2).

Accordingly, William is entitled to survivor benefits for Ray's lung cancer under Part B as outlined in 42 U.S.C. § 7384s(a)(1), and the FAB hereby awards him lump-sum benefits of $150,000.00 for that occupational illness under Part B. William's claim for survivor benefits under Part E for Ray's death due to lung cancer is denied. Jack's claim for survivor benefits under Parts B and E of EEOICPA for Ray's condition of lung cancer and his death due to lung cancer, respectively, is denied.

Washington, D.C.

s/Carrie A. Rhoads
Hearing Representative
Final Adjudication Branch

JORDAN 00000504

State of Washington Department of Health

Certificate of Death

Name:	Sex:	Date of Death:
Ray Willis Jordan	Male	February 21, 2000

Birthdate:	Birthplace:	County:
1914	Nelson, Nebraska	Benton

Location of Death:	Place of Death:
Richland	Kadlec Medical Center

Marital Status:	Surviving Spouse:
Widowed	Eunice Cleo Welker (deceased)

Decedent's Education:	Usual Occupation:
Elementary/Secondary: 8	Warehouseman

Kind of Business:	Race:
Construction	White

Residence:	Town:	Inside City Limits:
8102 East 2nd Street	Benton City	Yes

County:	Length of Residence:	State:
Benton	54 years	Washington

Zip Code:	Father's Name:	Mother's Name:
99320	Ben Franklin Jordan	Sarah Margaret Hill

Informant Name:	City:	State:	Zip Code:
Jack Jordan (son)	Blaine	Washington	99352

Burial/Cremation:	Date:
Cremation	Feb. 25, 2000

JORDAN 00000072

Cemetary/Crematory: **Location:**

Einan's Crematorium Richland, Washington

Funeral Director Signature:

s/Jeremy G. Weber

Name of Facility:

Einan's Funeral Home, Inc.

Address of Facility: **Date Signed:**

P.O. Box 90, Richland, WA 99352 2-22-2000

Hour of Death: **Signature:**

1410 s/Thomas Tan, M.D.

Name and Address of Certifier:

Thomas U. Tan, MD, 216 West 10th Avenue, Suite 300A, Kennewick, Washington 99336

Enter the Diseases, Injuries, or Complications which Caused the Death:

R.L.L. Pneumonia	4 days
Metastatic Non-small cell lung cancer	7 months
Radiation Fibrosis	5 months
Chronic Atrial Fibrillation	months

Other significant conditions: **Autopsy?**

CAD s/p angioplasty No

JORDAN 00000072

Was Case Referred to Medical Examiner?

No

Date Received: Feb. 24, 2000

> *deceased employee*, and age of child at time of employee's death. (Italics added)

See Federal (EEOICPA) Procedure Manual, Transmittal No. 03-02.

The district office letter, dated October 15, 2002, asked for proof of adoption in order to establish the claimant's eligibility as a survivor. Additional development is required to determine if Jack L. Jordan might qualify as a surviving stepchild of the employee.

Evidence to show whether a parent child relationship existed may consist of evidence to establish how long he lived with the employee, the degree of financial support that might have been provided to him, evidence the covered employee provided food, clothing, shelter, and the emotional support desirable for child development, or for any other factors that might establish a stepparent relationship. In other words, further development is required to establish the extent to which he had lived with the employee in a "regular parent-child relationship," as required based on the EEOICPA Procedure Manual,

effective as of December 20, 2002. After additional development, the claim should be submitted to the National Office for the determination by the Solicitor of Labor regarding, the claimant's eligibility for receiving compensation based upon the relevant State of Washington laws.

The undersigned has reviewed the recommended decision issued by the Seattle district office issued on December 17, 2002, denying your survivor claim for benefits for cancer. There would appear to be adequate medical evidence in support of a covered occupational illness, as well as proof that Ray W. Jordan engaged in covered employment.

Consequently, while the recommended decision dated December 17, 2002, was correct based on policies and procedures then in effect, it is necessary to remand your case for further development on the issue of your eligibility as a surviving stepchild.

CONCLUSION

For the reasons explained above the Final Adjudication Branch vacates the recommended decision dated December 17, 2002 and remands this case for further development.

On remand, the district office shall develop this case on the issue of the claimant's eligibility as a surviving stepchild of Ray W. Jordan. Further, the district office shall undertake any further development which becomes necessary. After considering any new evidence in the file, the district office shall refer the matter to the Solicitor of Labor for its determination as to the claimant's cligibility for receiving compensation as a stepchild based upon the relevant State of Washington laws.

February 6, 2003

To Whom It May Concern,

I am writing concerning my nephew Jack Jordan. I am Ray Jordan's sister and Jack Jordan's aunt. Jack came to live with Ray and Eunice Jordan in 1946 and he was three years old at the time. He lived with them until he was 18 or 19. At that time he joined the Marines. Ray was his soul [sic] provider during those years and loved him as his son. Their relationship has always been that of a father and son and continued until Ray passed away a few years ago.

Sincerely,

s/Myreta P. Shirley

Myreta P. Shirley

Shelley M. Morton 2/6/03

Notary Public County of Albany State of Wyoming

My Commission Expires March 29, 2005

JORDAN 00000161

Pupil Health Card

Jordan

~~Wyman~~ L. Jackie **Birthdate:** [Redacted]

Pupil's Last Name First Name

School Kiona Benton

Address Kiona Wa

Parents Uncle and Aunt (stays with) Ray W. Jordan

[Remainder Redacted]

JORDAN 00000169

PUPIL's CUMULATIVE RECORD

School Kiona Benton City Benton City

Jordan

Name ~~Wymann~~ Jackie Lee

Sex M

Race White

Place of Birth Yakima Wa

Mo. Day Year: [Redacted]

Entered From: Yakima

Date Feb 21 Age 6 Class 1

Lives With (Aunt + Mr. Ray Jordan)

Parents

Last Name	First	Living
Fa. Wyman	John	Yes
Mo. ~~Wyman Lue~~		No

Divorced No

Remarried No

Occupation Teamster/Housewife

Race W/W

High School Record Ray W. Jordan Eunice Jordan

[Remainder Redacted]

[handwritten note]

Ray Willis Jordan

Born [Redacted] to Ben and Margret [Redacted] Jordan in McPherson County Nebraska 5th child in family of 8 children. 5 boys, 3 girls. All grew up as farmers

I RAY came to Washington St. Jan. 1939. Met and married Eunice C. Hallmark Welker Oct 24 1940. Two boys William C. and Jack Lee one girl stillborn

Lived in Yakima till Nov. 1947. Moved to Kiona Benton City area. Worked 27 years construction at Hanford, retireing [sic] in 1977. Enjoying retiredment [sic]. Eunice entered Parkside Nurseing [sic] Home May 1983, passed away Oct. 8, 1993.

Father's info from 1995

U.S. Department of Labor

Employment Standards Administration Office of Worker Compensation Programs Division of Energy Employees Occupational Illness Compensation Washington, D.C. 20210

SEP 29 2003

MEMORANDUM FOR: CHRISTY LONG
District Director, DEEOIC
Seattle, Washington

FROM: RACHEL LEITON
Branch Chief, Policies, Regulations and Procedures

SUBJECT: Ray W. Jordan, [Redacted]

This case file was forwarded to the National Office for review and a determination on stepchildren eligibility.

Background

The covered employee, Ray Jordan, died on February 21,2000. According to the evidence of record he married

Eunice Welker on October 24, 1940. The file does not contain a marriage certificate, however, the marriage is verified by copies of their death certificates, medical records and written statements from William and Jack Jordan. Eunice Welker died on October 8, 1993.

When Ray Jordan married Eunice Welker, she had one child from a previous union. He is William (Kay) Jordan. A birth certificate in file confirms that Eunice Welker was the natural mother of William Jordan. He was 5 years old at the time that Ray Jordan married Eunice Welker. The record also contains a letter dated March 19, 1980 from the State of Washington's Department of Social and Health Services. The letter was written to Ray Jordan in response to his request for William Jordan's birth certificate. The letter states that the request for William's birth certificate could not be processed at that time because the birth was not "re-registered following the adoption."

William and Jack Jordan completed EE-2 forms claiming survivor benefits as the dependent children of Ray Jordan. Jack Jordan was born Jack Ackelson. The record contains a

petition to change his name from Jack Ackelson to Jack Jordan. The petition was granted on September 24, 1992. A birth certificate in file indicates that his mother was Lula Belle Welker (Eunice Welker's sister) and his father is listed as John Ackelson. A hand-written statement from Jack Jordan dated September 21,2001, states that his real father is unknown. He states that when he was born, his mother was unwed and listed a family friend, Jack Ackelson, on the birth certificate as his father. He further states that at the age of three, his mother died and he went to live with his aunt (Eunice Welker) and his uncle (Ray Jordan). He states that he lived with them from the age of 3 until he joined the marines.

In support of a parent-child relationship, Jack Jordan provided a cumulative copy of his report card from 1949 through 1956. His parents are listed as John and Lue Wyman. Jack Jordan provided a statement clarifying that John Wyman married his mother in 1945. He further stated that when his mother died in 1949, he moved in with Ray and Eunice Jordan. Although the report card contains the names of Ray and Eunice Jordan, it does not list them in any category showing a relationship with Jack Jordan.

The record also contains a copy of Ray Jordan's last will and testament appointing Jack Jordan as the executor of his estate.

JORDAN 00000235

U.S. Department of Labor

Employment Standards Administration Office of Worker Compensation Programs Division of Energy Employees Occupational Illness Compensation Washington, D.C. 20210

EMPLOYEE:	Ray W. Jordan
CLAIMANTS:	Jack L. Jordan
	William C. Jordan
FILE NUMBER:	[Redacted]
DOCKET NUMBERS:	37038-2003
	43145-2006
	10034810-2006
	10042121-2006

DIRECTOR'S ORDER

Pursuant to the authority granted by 20 C.F.R. § 30.320(a) and for the reasons set forth below, the January 17, 2007 decision of the Seattle Final Adjudication Branch (FAB) is

hereby vacated. The case file is returned to the Seattle district office of the Division of Energy Employees Occupational Illness Compensation (DEEOIC) for additional development and issuance of a new recommended decision.

The regulations at 20 C.F.R. § 30.320(a) state that a final decision, or any other decision issued by the FAB, may be reopened at any time on motion of the Director of DEEOIC. It further states that the case may be reopened without regard to whether new evidence or information is presented or obtained, and that the decision whether or not to reopen a case is solely within the discretion of the Director of DEEOIC.

On October 15, 2002, Jack L. Jordan filed an EE-2 form (Claim for Survivor Benefits under the EEOICPA) and acknowledged that he is, in fact, the nephew of Ray W. Jordan (the employee). William C. Jordan filed an EE-2 form on March 26, 2003 as the step-son of the employee. Jack contends that his relationship with his uncle was one of parent and child. In support of his claim. he stated that when his mother, Lulu Belle Welker, was pregnant and

unwed she asked her friend, John Ackelson, if she could name him as the father of her child on his birth certificate. From 1943 until 1944, Jack lived with his aunt Eunice Welker Jordan (sister of Lulu Belle), uncle Ray and cousin William. One year later in 1945, Lulu Belle Welker married Clyde Wyman and subsequently gave birth to

United States Marine Corps

Enlistment Contract and Record

6Sept60 AFQT 6-50

Name

JORDAN, Jack Lee

Place of Birth

Yakima, Yakima, Washington

Enlisted At

Seattle, King, Washington

Date of Enlistment

60 Sept 6

Transferred to/Retained at

MCRDep, San Diego, California

Est Date Arrival

60 Sept 7

[Remainder Redacted]

COPY FOR YOUR INFORMATION FEB 25 2000 FILED

LAST WILL AND TESTAMENT

OF

RAY W. JORDAN

00-4-00056-6

KNOW ALL MEN BY THESE PRESENTS: That I, **RAY W. JORDAN**, a resident of Benton County, Washington, being over the age of eighteen years and of sound and disposing mind and memory, do hereby revoke all wills and codicils as well as all other instruments of a testamentary nature heretofore made by me and do hereby make, publish and declare this my Last Will and Testament in manner and form following:

FIRST: I direct that my personal representative pay all legal debts, funeral and testamentary expenses.

SECOND: I hereby declare that I am not married and that I have no natural born or adopted children.

THIRD: I give, devise and bequeath all the rest, residue and remainder of my estate, real, personal and mixed of every name and character and nature whatsoever to JACK LEE JORDAN and WILLIAM JORDAN in equal shares, share and share alike, per stirpes and not per capita.

FOURTH: I hereby nominate and appoint JACK LEE JORDAN as the personal representative of this my Last Will and Testament, and direct that he shall administer my estate free from the control or direction of any court, except such proceedings as are by law required in the case of non-intervention wills. I further direct that no bond or security of any kind or character shall be required of him in the administration of my estate. I further give my personal representative full rights, power and authority to sell, mortgage or otherwise dispose of or encumber, any or all property of my estate, whether real, personal, or mixed, upon such terms and conditions as to him shall seem best, whether or not it is necessary to sell or mortgage or otherwise dispose of or encumber the same, to pay debts or expenses of administration. In the event that JACK LEE JORDAN is unwilling or unable to act as the personal representative of this my Last Will and Testament, then I nominate and appoint William Jordan as sole personal representative of this my Last Will and Testament, to serve under the same terms and conditions as could JACK LEE JORDAN were he to become the personal representative hereof, to serve without bond and without intervention of any court except insofar as may be

required by the laws of the State of Washington for the probate of non-intervention wills.

Date: 8/11/98

Signature: s/Ray W. Jordan

IN WITNESS WHEREOF, I, **RAY W. JORDAN**, have hereunto set my hand this 11 day of August, 1998.

s/Ray W. Jordan

RAY W. JORDAN

The foregoing instrument consisting of three (3) pages, of which this is the last, was on the day and year first above written, signed by Ray W. Jordan, published and declared as and for his Last Will and Testament, in our presence and the presence of each of us; and we, at his request and in his presence and in the presence of each other, have subscribed our names as witness thereto; and at said time, the said declarant was, in our opinion, of sound and disposing mind and memory and not acting under any menace, duress, fraud, coercion or undue influence.

s/Vickie Lynn Hamilton

Residing at Prosser, Washington

s/Virginia Heliz

Residing at Prosser, Washington

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Date: 8/11/98

Signature: s/Ray W. Jordan

Verification of Date and Place of Birth of Applicant

Last Name – First Name – Middle Name

JORDAN, Jack Lee

Place of Birth (City or Town and State)

Yakima, Washington

Date of Birth

[Redacted]

How Verified

Birth Verification

Remarks

Jack Lee JORDAN was given the name of Jack Lee ACKELSON at birth, but has been known by and used the name, Jack Lee JORDAN since the death of his parents in 1946, Jack Lee JORDAN and Jack Lee ACKELSON are one and the same person.

s/Frank N. Pond

Frank N. Pond SSgt (E-6)

Recruiter